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DATO' SERI ANWAR IBRAHIM

v.

PERDANA MENTERI MALAYSIA & ANOR

B

COURT OF APPEAL, PUTRAJAYA
ZULKEFLI MAKINUDIN JCA
RAUS SHARIF JCA
HELILIAH MOHD YUSOF JCA
[CIVIL APPEAL NO: W-01-164-1998]

C

25 APRIL 2007

CONSTITUTIONAL LAW: *Executive - Dismissal of Minister - Appellant's appointment as Deputy Prime Minister and Minister of Finance revoked by Prime Minister - Whether revocation contravened art. 43(5) Federal Constitution - Procedure to be followed - Whether revocation must be effected by Yang di-Pertuan Agong acting on advice of Prime Minister - Federal Constitution, art. 43(5) - Rules of the High Court 1980, O. 18 r. 19(a), (b), (d), 53*

D

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CIVIL PROCEDURE: *Striking out - Grounds for - Alleged contravention of art. 43 Federal Constitution - Whether pleadings disclosed no reasonable cause of action and were an abuse of process of court - Whether judge misdirected himself in concluding that case obviously unsustainable - Whether there was a serious question to be tried - Federal Constitution, art. 43(5) - Rules of the High Court 1980, O. 18 r. 19(a), (b), (d), 53*

F

CIVIL PROCEDURE: *Originating summons - Whether application can be made by originating summons - Validity of a public authority's act or omission questioned - Whether institution of proceedings by ordinary summons would deprive public authority of protection of law it was entitled to by processes available under O. 53 Rules of the High Court 1980 - Federal Constitution, art. 43(5) - Rules of the High Court 1980, O. 18 r. 19(a), (b), (d), 53*

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This was an appeal by the appellant against the decision of the High Court allowing the respondents' application to strike out the appellant's originating summons and the affidavit in support, pursuant to O. 18 r. 19(a), (b) and (d) of the Rules of the High Court 1980 ('RHC'). The appellant was appointed as the Deputy Prime Minister and Minister of Finance after the 1995 general

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election. On 2 September 1998, the appellant was served with a letter from the Prime Minister ('1st respondent') stating that his appointment as the Deputy Prime Minister and Minister of Finance was revoked with immediate effect. The appellant, however, contended that the revocation of his appointment as a Cabinet Minister contravened art. 43(5) of the Federal Constitution ('FC'), the reason being that the wording in the letter of revocation that "Perlucutan ini telah dimaklumkan kepada Seri Paduka Baginda Yang di-Pertuan Agong" ran counter to the clear wording of art. 43(5) of the FC, that provided that the appointment of any Minister ought to be revoked by the Yang di-Pertuan Agong on the advice of the Prime Minister. The appellant thus filed an originating summons and an affidavit in support, seeking declarations that art. 43(5) of the FC had been contravened, that his dismissal was null and that he was still a Minister in the Malaysian Cabinet. The respondents then filed an application to strike out the appellant's originating summons and affidavit in support on the grounds that the pleadings disclosed no reasonable cause of action and were an abuse of the process of the court. The learned judge agreed with the respondents, holding that the letter of revocation had satisfied art. 43(5) of the FC. The appellant appealed, submitting that the learned judge had seriously misdirected himself in fact and in law when concluding that the appellant's case disclosed no reasonable cause of action and was obviously unsustainable. The appellant averred that the letter of revocation by itself had raised a serious question to be tried *ie*, whether prior assent of the Yang di-Pertuan Agong had been obtained when the letter of revocation was sent to the appellant.

Held (dismissing the appeal)
Per Zulkefli Makinuddin, Raus Sharif dan Heliliah Mohd Yusof JJCA:

(1) Although there was nothing in the 1st respondent's letter to indicate that the letter was written on the command of the Yang di-Pertuan Agong, it would be more than sufficient for the 1st respondent to have stated that he had informed the Yang di-Pertuan Agong about the revocation. Under the scheme of the FC, the Yang di-Pertuan Agong is a constitutional monarch who acts on ministerial advice and not on his own initiative. The power to dismiss any Minister

A is in effect with the Prime Minister. He can, at any time, advise the Yang di-Pertuan Agong to dismiss any Minister and His Majesty is bound to act on the advice of the Prime Minister. In short, no Minister can remain as a member of the Cabinet if the Prime Minister decided that he should be
B dismissed. Therefore, there was nothing wrong for the 1st respondent as the Prime Minister to have stated in the letter that, with regret, he had to dismiss the appellant from holding the posts of Deputy Prime Minister and Minister of Finance as well as other posts in the Government held by
C the appellant as Deputy Prime Minister and Minister of Finance. (paras 2 & 16)

(1a) With the law as it stands, the appellant's case could not be sustained bearing in mind that he was asking the court to
D declare that he was still a minister in the Cabinet. In fact, the relief sought by the appellant had become academic. Firstly, he was no longer a member of either House of Parliament and, secondly, the Parliament in which he was elected as a member of the House of Representatives had
E been dissolved. Thus, to accede to the appellant's submission that the case should be sent back to the High Court to have it tried would clearly be an exercise in futility. (para 16)

F **(2)** The format and the manner on how a revocation of the appointment of a Cabinet Minister is to be effected is not provided in the law. There is also no provision in the law that the revocation of the appellant's appointment as a Cabinet Minister should be communicated to the appellant
G personally by the Yang di-Pertuan Agong. The letter for the revocation of the appointment of the appellant that was handed to the appellant stated that the Yang di-Pertuan Agong had been informed. By this statement from the 1st respondent, it would a fair inference to make a finding that
H in fact, on or before 2 September 1998, the decision and the advice of the 1st respondent had already been conveyed to the Yang di-Pertuan Agong, who had accepted the said decision and advice. (paras 3)

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(2a) The case for the respondents was further fortified by the affidavit evidence of one Hj. Ja'afar Wahab, who was then the Confidential Secretary to the Yang di-Pertuan Agong, affirming that the Yang di-Pertuan Agong had informed him of the decision and the advice of the 1st respondent to revoke the appellant's appointment as a Minister, and that his Majesty had duly accepted the said decision and advice of the 1st respondent. On this material point, the appellant did not at all challenge the said evidence from Hj. Ja'afar. It is a well-settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted. (paras 3 & 18)

(3) It was not a question here of the appellant not being able to have access to the court but a question of which procedure to be adopted. The requirement for O. 53 of the RHC to be utilised is predicated on the following: (a) the challenge is on public law where the validity of a public authority's act or omission is being questioned; and (b) the appellant is not seeking to enforce a completely constituted private law right but his right of employment as a Minister. This suit raised issues of public law since it was a decision and action taken by the Prime Minister in pursuance of the provisions of the FC that was being impugned. Such a decision taken by the Prime Minister with regard to a Minister as a member of the administration in his public duties was one that had implications for the public as a whole, and it was in consequence of this that public law was concerned with the decision-making process. The legal sources of the powers that were being impugned were in the public domain. As such, to institute the proceedings by ordinary summons, although seemingly appearing to be simple in procedure, would deprive the public authority in this case, the Federal Government, of the protection of the law that it was entitled to by the processes available under O. 53 of the RHC. (paras 36 & 38)

(3a) It was reasonable to anticipate that had the trial judge not granted the application to strike out in favour of the respondents, they would have lodged an appeal. Although the position would be hypothetical in the present circumstances, such an appeal would serve to illustrate further that this suit was ill founded (*R v. Entry Clearance Officer, Bombay, Ex p Amin* (foll)). For these reasons, this suit constituted a misuse of the processes of court and was, therefore, unsustainable. (paras 39 & 40)

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi kerana membenarkan permohonan responden untuk membatalkan saman pemula dan afidavit sokongan perayu di bawah A. 18 k. 19(a), (b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Perayu telah dilantik sebagai Timbalan Perdana Menteri dan Menteri Kewangan selepas pilihanraya umum tahun 1995. Pada 2 September 1998, perayu menerima surat dari Perdana Menteri ('responden pertama') menyatakan bahawa perlantikannya sebagai Timbalan Perdana Menteri dan Menteri Kewangan telah dimansuhkan dengan serta merta. Perayu bagaimanapun menyatakan bahawa pemansuhan perlantikannya sebagai Menteri Kabinet telah melanggar fasal 43(5) Perlembagaan Persekutuan ('PP'), disebabkan perkataan yang digunakan di dalam surat pemansuhan, iaitu "Perlucutan ini telah dimaklumkan kepada Seri Paduka Baginda Yang di-Pertuan Agong" melanggar ungkapan nyata fasal 43(5) PP, yang memperuntukkan bahawa perlantikan mana-mana Menteri hanya boleh dimansuhkan oleh Yang di-Pertuan Agong atas nasihat Perdana Menteri. Perayu dengan itu memfailkan saman pemula dan afidavit sokongan memohon deklarasi bahawa fasal 43(5) PP telah dicabuli, bahawa perlucutan jawatannya adalah tak sah dan batal dan bahawa beliau masih lagi seorang Menteri dalam Kabinet Kerajaan Malaysia. Berikutnya, responden-responden memfail permohonan untuk membatalkan saman pemula dan afidavit sokongan perayu atas alasan bahawa pliding tidak mendedahkan satu kausa tindakan yang munasabah dan adalah satu penyalahgunaan proses mahkamah. Yang arif hakim bersetuju dengan responden-responden, sekaligus memutuskan bahawa surat pemansuhan telah memenuhi kehendak fasal 43(5) PP. Perayu merayu dan berhujah bahawa yang arif hakim, dalam memutuskan kes perayu sebagai tidak mendedahkan

kausa tindakan yang munasabah dan tidak boleh dipertahankan, telah tersalah arah akan dirinya di atas fakta dan di sisi undang-undang. Menurut perayu, surat pemansuhan tersebut dengan sendirinya membangkitkan satu persoalan serius untuk dibicarakan, iaitu sama ada persetujuan terdahulu Yang di-Pertuan Agong telah diperolehi semasa surat pemansuhan dihantar kepada perayu.

Diputuskan (menolak rayuan)
Oleh Zulkefli Makinuddin, Raus Sharif and Heliliah Mohd Yusof HHMR:

(1) Walaupun tiada apa-apa di dalam surat responden pertama yang menunjukkan bahawa surat ditulis atas perintah Yang di-Pertuan Agong, adalah memadai bahawa responden pertama telah menyatakan bahawa ia sudah memberitahu Yang di-Pertuan Agong mengenai pemansuhan itu. Di bawah skim PP, Yang di-Pertuan Agong adalah raja berperlembagaan yang bertindak atas nasihat menteri dan tidak atas inisiatifnya sendiri. Kuasa untuk melucutkan jawatan mana-mana Menteri adalah secara berkesannya terletak pada Perdana Menteri. Beliau boleh, pada bila-bila masa, menasihati Yang di-Pertuan Agong untuk melucutkan jawatan mana-mana Menteri dan Baginda perlu mematuhi nasihat Perdana Menteri itu. Pendek kata, tidak ada Menteri boleh terus menjadi ahli Kabinet sekiranya Perdana Menteri memutus untuk melucutkannya. Oleh itu, tiada salahnya bagi responden pertama selaku Perdana Menteri untuk menyatakan di dalam suratnya bahawa beliau, dengan kesalnya, terpaksa melucutkan perayu dari jawatan Timbalan Perdana Menteri dan Menteri Kewangan serta dari jawatan-jawatan lain di dalam Kerajaan yang dipegang perayu dalam kapasitinya selaku Timbalan Perdana Menteri dan Menteri Kewangan.

(1a) Berdasarkan undang-undang sedia ada, kes perayu tidak boleh dipertahankan memandangkan permohonan beliau adalah supaya mahkamah mengisytiharkan bahawa beliau masih lagi seorang menteri di dalam Kabinet. Pada hakikatnya, relif yang dipohon perayu sudah menjadi akademik. Pertama, beliau bukan lagi ahli kepada kedua-dua Badan Parlimen, dan kedua, Parlimen yang beliau menjadi ahli Badan Perwakilannya telah pun dibubarkan. Oleh itu, memenuhi permohonan perayu supaya kes dikembalikan ke Mahkamah Tinggi untuk perbicaraan adalah satu langkah sia-sia.

(2) Kaedah dan cara bagaimana perlantikan seseorang Menteri Kabinet boleh dimansuhkan tidak diperuntukkan oleh undang-undang. Juga tiada peruntukan di sisi undang-undang bahawa pemansuhan jawatan perayu sebagai Menteri Kabinet perlu disampaikan kepadanya secara kediri oleh Yang di-Pertuan Agong. Surat pemansuhan perlantikan perayu yang disampaikan kepada perayu menyatakan bahawa Yang di-Pertuan Agong telahpun diberitahu. Dengan kenyataan oleh responden pertama ini, maka inferens munsasabah boleh dibuat bahawa, pada atau sebelum 2 September 1998, keputusan dan nasihat responden pertama telahpun disampaikan kepada Yang di-Pertuan Agong, yang menerima keputusan dan nasihat tersebut.

(2a) Kes responden-responden diperkukuhkan lagi melalui keterangan afidavit seorang Hj. Ja'afar Wahab, Setiausaha Sulit Yang di-Pertuan Agong ketika itu, yang mengesahkan bahawa Yang di-Pertuan Agong telah memberitahunya mengenai keputusan dan nasihat responden pertama untuk memansuhkan perlantikan perayu sebagai seorang Menteri, dan bahawa Baginda telah menerima keputusan dan nasihat tersebut. Keterangan Hj. Ja'afar ini langsung tidak dicabar oleh perayu. Sudah menjadi prinsip mantap dalam menilai keterangan afidavit bahawa di mana satu pihak membuat kenyataan positif berkenaan sesuatu isu material, maka kegagalan pihak lawan untuk menyangkalnya akan menyebabkan ia dianggap sebagai telah mengaku akan kebenaran kenyataan positif tersebut.

(3) Persoalannya di sini bukanlah bahawa perayu tidak mendapat akses untuk ke mahkamah tetapi adalah mengenai prosedur yang harus diikuti. Untuk menggunapakai kaedah A. 53 KMT, syarat-syarat berikut hendaklah dipatuhi, iaitu: (a) cabaran adalah mengenai undang-undang awam di mana kesahan sesuatu tindakan atau ketinggalan oleh pihakberkuasa awam dipersoalkan; dan (b) hasrat perayu buka semata-mata untuk menuntut hak peribadinya tetapi haknya sebagai seorang Menteri. Tindakan di sini membangkitkan isu undang-undang awam disebabkan yang dicabar adalah keputusan dan tindakan yang diambil oleh Perdana Menteri di bawah peruntukan PP. Keputusan yang diambil oleh Perdana Menteri terhadap seorang Menteri yang menjadi ahli

pentadbirannya sedemikian adalah sesuatu yang mengandungi implikasi terhadap pihak awam pada keseluruhannya, dan akibatnya undang-undang awam terpakai kepada proses membuat keputusan tersebut. Sumber undang-undang bagi kuasa yang dicabar tersebut berada dalam halehwal awam. Oleh yang demikian, dengan memulakan tindakan melalui saman biasa, walaupun nampak mudah dari segi prosedur, akan menahan pihakberkuasa awam, dalam kes ini Kerajaan Persekutuan, dari mendapat perlindungan undang-undang yang ia berhak mendapatnya dari proses yang dibuat di bawah A. 53 KMT.

(3a) Adalah boleh dijangkakan bahawa sekiranya hakim bicara tidak membenarkan permohonan responden-responden untuk membatal, maka responden-responden akan memfailkan rayuan. Walaupun kedudukan ini, dalam halkeadaan kes, agak hypothetical, namun rayuan sedemikian menunjukkan bahawa tindakan di sini adalah kurang berasas (*R v. Entry Clearance Officer, Bombay, Ex p Amin* (diikuti)). Atas alasan-alasan ini, tindakan di sini adalah satu penyalahgunaan proses mahkamah dan dengan itu tidak boleh dipertahankan.

Case(s) referred to:

Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1980] 1 MLJ 382 ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Dato' Sri Anwar Ibrahim v. PP [2000] 2 CLJ 695 CA ***(foll)***

Gabriel Peter & Partner v. Wee Chong Jin [1998] 1 SLR 374 ***(refd)***

Ng Hee Thoong v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

O'Reilly v. Mackman [1983] 2 AC 237 ***(refd)***

Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC ***(refd)***

Punton v. Ministry of Pensions and Natural Insurance [1963] 1 All ER 275 ***(refd)***

R v. Entry Clearance Officer, Bombay, Ex p Amin [1983] 2 AC 818 ***(foll)***

Sim Kie Chon v. Superintendent of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, para 1 of the schedule

Federal Constitution, arts. 5(1), 43(5)

Rules of the High Court 1980, O. 7, O. 15 r. 16, O. 18 r. 19(1)(a), (b), (d), O. 53

For the appellant - Karpal Singh (Ram Karpal Singh & SN Nair with him); M/s Karpal Singh & Co
For the respondents - Asmabi Mohamad SFC; Attorney General's Chambers

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S5-21-185-1998]

Reported by Suresh Nathan

JUDGMENT

Zulkefli Makinudin JCA:

[1] I have read the judgment in draft of my learned brother Raus Sharif, JCA. I agree with the views expressed and the orders made by his lordship in dismissing this appeal by the appellant. It is my respectful view the learned judge of the High Court was right in construing that the letter of revocation dated 2 September 1998 by the first respondent has satisfied the requirement of art. 43(5) of the Federal Constitution. I would like to add in a few words in support of the judgment of my learned brother Raus Sharif, JCA as follows.

[2] To my mind the issue to be decided in this appeal is quite straight-forward. The starting point of the complaint by the appellant is that the letter of revocation dated 2 September 1998 from the first respondent revoking the appellant's appointment as a Cabinet Minister was in contravention of art. 43(5) of the Federal Constitution. By particular reference to the third paragraph of the said letter which reads, "Perlucutan ini telah dimaklumkan kepada Seri Paduka Yang di-Pertuan Agong", the appellant contended that the said revocation was effected by the first respondent without having a prior assent of the Yang di-Pertuan Agong. With respect, I cannot agree with the appellant's contention. Although there is nothing in the first respondent's letter to indicate that the letter was written on the command of the Yang di-Pertuan Agong, in my view it would be more than sufficient for the first respondent to have stated that he had informed the Yang di-Pertuan Agong about the revocation. As rightly stated by my learned brother Raus Sharif, JCA in his judgment that under the scheme of our Federal Constitution the power to dismiss any Minister is in effect with the Prime Minister.

He can at any time advise the Yang di-Pertuan Agong to dismiss any Minister and the Yang di-Pertuan Agong as a constitutional monarch is bound to act on the advice of the Prime Minister. Therefore, in my view there is nothing wrong for the first respondent as the Prime Minister to have stated in the said letter dated 2 September 1998 that with regret he had to dismiss the appellant from holding the posts of Deputy Prime Minister and Minister of Finance as well as other posts in the Government held by the appellant as Deputy Prime Minister and Minister of Finance.

[3] It has also to be stated here that the format and the manner on how a revocation of the appointment of a Cabinet Minister is to be effected is not provided in the law. There is also no provision in the law that the revocation of the appointment of the appellant as a Cabinet Minister shall be communicated to the appellant personally by the Yang di-Pertuan Agong. The letter for the revocation of the appointment of the appellant which was handed to the appellant stated that the Yang di-Pertuan Agong had been informed. It is my view by this statement from the first respondent it would be a fair inference to make a finding that in fact on or before 2 September 1998 the decision and the advice of the first respondent had already been conveyed to the Yang di-Pertuan Agong and that the Yang di-Pertuan Agong had accepted the said decision and advice. The case for the respondents is further fortified by the affidavit evidence of Hj. Ja'afar bin Wahab who was then the Confidential Secretary to the Yang di-Pertuan Agong, affirming that the Yang di-Pertuan Agong had informed him of the decision and the advice of the first respondent to revoke the appellant's appointment as a Minister and his Majesty had duly accepted the said decision and advice of the first respondent. On this material point it is to be noted that the appellant did not at all challenge the said evidence from the Confidential Secretary to the Yang di-Pertuan Agong. Accordingly, I would dismiss the appeal.

Raus Sharif JCA:

[4] This is an appeal against the decision of the High Court, Kuala Lumpur, delivered on 24 December 1998, in allowing the respondents' application to strike out with costs the appellant's originating summons and the affidavit in support, pursuant to O. 18 r. 19(a), (b) and (d) of the Rules of the High Court 1980 ("RHC").

[5] We heard the appeal on 26 February 2007 and at the conclusion of the hearing we reserved our decision.

[6] The relevant facts of this case are these. The appellant was appointed as the Deputy Prime Minister and also the Minister of Finance after the 1995 general election. On 2 September 1998, the appellant was served with a letter ("letter of revocation") from the Prime Minister ("first respondent") stating that his appointment as the Deputy Prime Minister and Minister of Finance was revoked with immediate effect. The letter of revocation reads as follows:

> Yang Berhormat Dato' Seri Anwar bin Ibrahim
>
> Yang Berhormat Dato',
>
> Dengan dukacitanya saya terpaksa melucutkan jawatan-jawatan Timbalan Perdana Menteri dan Menteri Kewangan daripada Dato' Seri serta lain-lain jawatan dalam Kerajaan yang dipegang oleh Dato' Seri sebagai Timbalan Perdana Menteri dan Menteri Kewangan.
>
> Perlucutan ini berkuatkuasa dari hari ini, 2 September 1998 mulai jam 5.30 petang.
>
> Perlucutan ini telah dimaklumkan kepada Seri Paduka Baginda Yang di Pertuan Agong.
>
> Salam hormat.
>
> t.t. Dr. Mahathir bin Mohamad
>
> 2 September 1998.

[7] Premised on the letter of revocation, the appellant contended that the 1st respondent had unlawfully revoked his appointment as a Cabinet Minister. According to the appellant the revocation of his appointment was in contravention of art. 43(5) of the Federal Constitution. The reason is because the wordings of the letter of revocation that "Perlucutan ini telah dimaklumkan kepada Seri Paduka Baginda Yang di Pertuan Agong" runs in the face of the clear wordings of art. 43(5) which provides that the appointment of any Minister shall be revoked by the Yang di Pertuan Agong on the advice of the Prime Minister. In other words, the appellant is contending that the revocation must be effected by the Yang di Pertuan Agong acting on the advice of the 1st respondent. It cannot be effected by the 1st respondent without having a prior assent of the Yang di Pertuan Agong.

[8] Hence, the appellant in his originating summons sought for the following relief: A

(a) a declaration that the 1st respondent had acted in contravention of the provision of art. 43(5) of the Federal Constitution when purporting to dismiss the appellant from the Malaysian Cabinet; B

(b) a declaration that the appellant's dismissal as Minister in the Malaysian Cabinet by the 1st respondent from 5.30pm 2 September 1998 is null and void, inconsequential and of no effect; C

(c) a declaration that the appellant is still a Minister in the Malaysian Cabinet; and

(d) costs and other relief deem fit and proper. D

[9] After having entered appearance, the respondents then filed an application pursuant to O. 18 r. 19(1)(a), (b) and (d) of the RHC to strike out the appellant's originating summons and affidavit in support on the grounds that the pleadings disclose no reasonable cause of action and that the pleadings are scandalous, frivolous, vexatious and an abuse of the process of the court. The respondents' application was premised on the grounds that: E

(a) the Yang di Pertuan Agong had given His Majesty assent to the appellant's dismissal; F

(b) the Yang di Pertuan Agong had made the Ministers of the Federal Government (Amendment) Order 1998, ("Amendment Order 1998") to delete the name of the appellant from the post of Deputy Prime Minister and had substituted that column with the name of the 1st respondent for the post of the Finance Minister; and G

(c) this is a clear and obvious case for the court to strike out the appellant's originating summons and the affidavit in support. H

[10] The respondents' application was supported by the affidavits of Tan Sri Abd Halim bin Ali ("Tan Sri Halim") affirmed on 20 November 1998 and Hj. Ja'apar bin Wahab ("Hj. Ja'apar") affirmed on 25 November 1998. Hj. Ja'apar was then the Confidential Secretary to the Yang di Pertuan Agong. In his affidavit, Hj. Ja'apar stated that the Yang di Pertuan Agong had I

informed him of the decision and the advice of the 1st respondent to revoke the appellant's appointment as a Minister and His Majesty had accepted the decision and advice of the 1st respondent. Hj. Ja'apar further stated that on 5 September 1998, he was informed by Yang di Pertuan Agong that His Majesty had given His Majesty's assent to the Amendment Order 1998 which in effect had deleted the appellant's name from the relevant column in the Amendment Order 1998 and had substituted the column with that of the 1st respondent.

[11] Tan Sri Halim, who was then the Chief Secretary to the Government, in his affidavit stated that on 4 September 1998 he had handed the Amendment Order 1998 to Datuk Pengelola Bijaya Diraja at the Istana Negara to seek His Majesty's assent to the Amendment Order 1998. According to him, the Amendment Order 1998 was returned to him on 5 September 1998 after being assented to by the Yang di Pertuan Agong. On 7 September 1998, Tan Sri Halim, who was also then the Secretary to the Cabinet signed the Amendment Order 1998 and had it gazetted on the same day. The Amendment Order 1998 date of operation was backdated to 3 September 1998.

[12] The learned judge agreed with the respondents. According to the learned judge, the letter of revocation by the 1st respondent, has satisfied the requirement of art. 43(5) of the Federal Constitution. The learned judge said it in the following words:

> It is true that there is nothing in PM's letter to show that the letter was written at the behest of the King. Nevertheless as the King was advised and informed about the decision (keputusan) as evidenced by para 4 and 5 of the affidavit (end. 10) of the private secretary, such omission, in my view, is of no consequence. A *fortiori*, the aforesaid affidavit evidences lend support to the averment in PM's letter in that he (PM) had informed the King about the revocation. Looking at undisputed facts objectively, in substance although not in form, in my judgment, the letter of revocation, has satisfied the requirement of art. 43(5).

[13] Before us, En. Karpal Singh, learned counsel for the appellant, submitted that the learned judge had seriously misdirected himself in fact and in law when concluding that the appellant's case discloses no reasonable cause of action and was obviously unsustainable. According to En. Karpal the appellant's

case was not one which was plain and obviously unsustainable meriting recourse to the summary process of striking out. He submitted that the letter of revocation by itself had raised a serious question to be tried ie, whether prior assent of the Yang di Pertuan Agong had been obtained when the letter of revocation was sent to the appellant.

[14] Senior Federal Counsel, Puan Asmabi Mohamad submitted otherwise. In essence, the Senior Federal Counsel, repeated the same argument advanced before the learned judge, in that the appellant's case was obviously unsustainable.

[15] The principle governing O. 18 r. 19 of the RHC is well settled. The Federal Court in *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293:

> The principle governing the striking out of pleadings is clear in that it is only in plain and obvious cases that recourse should be had to the summary process under O. 18 r. 19 of the Rules of the High Court 1980: "the summary procedure under this rule can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'.

[16] The above view was repeated by the Federal Court in *Bandar Builder Sdn. Bhd. & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 at p. 11:

> The principles upon which the courts act in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'.

The Federal Court further stated at the same page:

> The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[17] Thus, the main issue before us is whether the appellant's claim is obviously unsustainable. In order to do so, it is necessary to examine the provisions of the Federal Constitution, in relation to the appointment and revocation of Cabinet Ministers. It is found in art 43. The relevant provisions reads:

A 43 (1) The Yang di Pertuan Agong shall appoint a Jemaah Menteri (Cabinet of Ministers) to advise him in exercise of his function:

(2) The Cabinet shall be appointed as follows, that is to say:

B (a) the Yang di Pertuan Agong shall first appoint as Perdana Menteri (Prime Minister) to preside over the Cabinet a member of the House of Representative who in his judgment is likely to command the confidence of the majority of the members of that House; and

C (b) he shall on the advice of the Prime Minister appoint other Menteri (Ministers) from among the members of either House of Parliament.

(5) Subject to Clause (4), Minister other than the Prime Minister shall hold office during the pleasure of the Yang di D Pertuan Agong, unless the appointment of any Minister shall have been revoked by Yang di Pertuan Agong on the advice of the Prime Minister but any Minister may resign his office.

[18] The working of art. 43(5) was considered by this court in E *Dato' Sri Anwar bin Ibrahim v. Public Prosecutor* [2000] 2 CLJ 695. Lamin PCA (as he then was) speaking for the Court of Appeal said:

Under the above provisions, a Minister other than the Prime Minister holds office at the pleasure of the Prime Minister. In F actual terms, he holds office at the pleasure of the Prime Minister. This means that the Prime Minister may revoke his appointment at any time. Of course formality demands that the revocation of his appointment shall be acted upon by the Yang di Pertuan Agong 'on the advice of the Prime Minister'. The Yang di G Pertuan Agong must act on such advice.

[19] With respect, I shared the same view. Under the scheme of our Federal Constitution, the Yang di Pertuan Agong is a constitutional monarch who acts on ministerial advice and not on his own initiative. The power to dismiss any Minister is in effect H with the Prime Minister. He can at any time advise the Yang di Pertuan Agong to dismiss any Minister and His Majesty is bound to act to the advice of the Prime Minister. In short, no Minister can remain as a member of the Cabinet if the Prime Minister decided that he should be dismissed. Hence, with the law as it I stands, I cannot see how the appellant's case can be sustained

bearing in mind that he was asking the court to declare that he is still a Minister in the Cabinet. In fact, the relief sought by the appellant had become academic. Firstly, he is no longer a member of either House of Parliament. Secondly, the Parliament on which he was elected as a member of the House of Representative had been dissolved. Thus, to accede to Mr. Karpal's submission that the case should be sent back to the High Court to have it tried, would clearly be an exercise of futility.

[20] Mr. Karpal conceded that the court can no longer declare that the appellant is still a Minister in the Cabinet. However, he argued that, if a full trial is ordered and if the appellant succeeded in proving his case, the appellant should be entitled to damages. Mr. Karpal's main reason why a full trial should be ordered in this case is because the letter of revocation in itself had created a serious doubt whether the 1st respondent had in fact advised the Yang di Pertuan Agong on revocation of the appellant as a Cabinet Minister.

[21] My respectful view is that the revocation letter by itself to a certain extent had created an impression that the formality of advising the Yang di Pertuan Agong was not done by the 1st respondent. However looking at the affidavits filed in support of the respondents' application, there is more than sufficient evidence to show that the formality was done. We have the affidavit evidence of Hj. Ja'apar who had affirmed that the Yang di Pertuan Agong had accepted the decision and the advice of the 1st respondent pertaining to the revocation of the appellant. The appellant did not contradict the said evidence. It is well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him the fact so asserted. (See *Ng Hee Thoong v Public Bank Bhd.* [1995] 1 CLJ 609, *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1980] 1 MLJ 382; *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82).

[22] We also have an affidavit evidence of Tan Sri Halim, stating that the Yang di Pertuan Agong had assented the Amendment Order 1998 on 5 September 1998 which was subsequently gazetted on 7 September 1998. To me, the assenting of the Amendment Order 1998 by the Yang di Pertuan Agong was a

clear indication that His Majesty had accepted the advice (which His Majesty cannot refuse) of the 1st respondent to dismiss the appellant as a member of the Cabinet.

[23] In view of the foregoing, I see no justification in ordering a full trial of this case. Firstly, the relief sought by the appellant had become academic. Secondly, there is no triable issue to be tried. The appeal is dismissed with costs.

Heliliah Mohd Yusof JCA:

[24] The analysis of facts and arguments in this appeal as contained in the judgement of my learned brother Raus Sharif JCA which I have read in draft relieves me of the labour of repeating the background of the case. While I am not differing from my learned brothers in arriving at a conclusion that the suit is not sustainable I wish to proffer different observations which are the following.

[25] The appellant's claim for a declaration was filed pursuant to O. 7 and O. 15 r. 16 of the High Court Rules 1980 (HCR 1980). It is also noted that the respondent has in filing an originating summons to strike out the claim invoked O. 18 rr. 19(1)(a), (b) and (d). The trial judge has ruled in favour of the respondents by granting order in terms namely that the appellant's claim was to be struck out on the ground that it discloses no reasonable cause of action, that it is scandalous, frivolous or vexatious or that it is otherwise an abuse of the process of the court.

[26] In his judgment the learned judge made the following finding *inter alia*:

> it is glaring to me that plaintiff's case discloses no reasonable cause of action and is obviously unsustainable.

[27] Such use of words would invite one to infer that the appellant's claim to the declaratory relief would fall only under O. 18 r. 19(1)(a) but as mentioned above judgment was entered on the basis that the claim fell by virtue of paras (a), (b) and (d).

[28] The Memorandum of Appeal has listed seven grounds but it could be simply be summarised as follows:

a) the appellant's claim was not one which was plain and obviously unsustainable meriting recourse to the summary process of striking out.

b) there was an alleged miscarriage of justice as the appellant had been deprived off his livelihood and the revocation of the appellant's appointment as Minister of Finance and as Deputy Prime Minister had been effected through a process that was not in consonance with the provisions of art. 43(5) of the Federal Constitution.

[29] I find it necessary to encapsulate the above as the relief that is sought is a discretionary remedy in the form of a declaratory judgment. As the learned counsel for the appellant Mr. Karpal had conceded it was far too late in the day to consider a form of reinstatement but he had mentioned the question of damages.

[30] The pertinent question here was whether the learned trial judge had exercised his discretion properly for it is averred that he had misdirected himself in fact and in law in striking out the appellant's suit *in limine*. It has to be reiterated that the learned High Court Judge had to address a suit filed for a declaratory relief though the originating summons procedure. In *Punton v. Ministry of Pensions and Natural Insurance* [1963] 1 All ER 275 at 278 Lord Denning had observed that an originating summons still remains a sensible and modern way of approach "for obtaining a declaration". The appellant has filed an affidavit in support of his originating summons. The thrust of the suit is the challenge to the validity of the processes by which his appointments as Minister of Finance as well as to the post of Deputy Prime Minister have been terminated and where it is averred that that it has been done by the first respondent in contravention of the provision of art. 43(5) of the Federal Constitution. The gist of the contention is that it is His Majesty the Yang DiPertuan Agong and not the first defendant who has the authority or right to terminate the appointment of the appellant as Minister.

[31] Learned counsel for the appellant has averred that in losing his office it has caused him to lose his means of livelihood and has thus attracted the provisions of art. 5(1) of the Federal Constitution. However the decision to terminate his services as a member of the administration is the decision of a public authority acting in accordance with the Federal Constitution and deriving authority from the Federal Constitution.

[32] The whole process being questioned is not that the Prime Minister does not have the power to dismiss but that he could only do so upon compliance and observation of certain procedures which in the circumstances of the present case as contended by learned counsel for the appellant, it must be shown that His Majesty the Yang DiPertuan Agong was properly advised. Learned counsel for the appellant has contended that the very contents of the affidavits filed in support of the application to strike out by themselves show that there are merits for the suit to be adjudicated at a full trial. Nevertheless it still remains the case that what has been resorted to is a procedure under O. 7 of the RHC and for an order under O. 15 r. 16 of the RHC 1980.

[33] The draft judgments of both my learned brothers Zulkefli Ahmad Makinudin JCA and Raus Sharif JCA that I have the opportunity to peruse have indicated that the Federal Constitution does not proscribe the actual procedures for the removal of a Minister. The repeated arguments of the learned counsel of for the appellants on the issue of the legality of the process of termination of a Ministerial appointment and the repeated submission of the learned senior federal counsel that the action is not sustainable amply demonstrate, that in this appeal, there is warranted an occasion to cite the views of Lord Diplock in *O'Reilly v. Mackman* [1983] 2 AC 237. The reason that I have found compelling is that the court is in effect being urged to look at the processes of decision making where illegalities are contended.

[34] By virtue of the Rules of the High Court (Amendment) 2000 *vide* PU (A) 342/2000 published 21 September 2000 a new O. 53 replaced the former O. 53. The new O. 53 makes explicit reference to para. 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein. The said schedule (para. 1) prescribes *inter alia* that the power of the High Court under that paragraph includes *inter alia*, the power to issue to any ... or authority directions ... order or writs including writs of the nature ... of ... or any others for the enforcements of the rights conferred by Part II of the Constitution, or any of them, or for any purpose. The new O. 53 may not be in all respects in *pari materia* with the amendments in England.

[35] It is the submission of the learned counsel that the appellant has been engaged in lawful and gainful employment and that the employment has been terminated in a process that is legally questionable. But the appellant is not employed under a private contract nor by a statutory authority. The source of his appointment is in the domain of public law that is the Federal Constitution. Hence my reasons for the compelling need to refer to certain passages in the not uncriticised decision of *O'Reilly v. Mackman (supra)* the relevant parts of which is at pp. 284-285 (per Lord Diplock):

> My Lords, Order 53 does not expressly provide that procedure by application for judicial review shall be the exclusive procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law; There is great variation between individual cases that fall within Order 53 and the Rules Committee and subsequently the legislature were, I think, for this reason content to rely upon the express and the inherent power of the High Court, exercised upon a case to case basis, to prevent abuse of its process whatever might be the form taken by that abuse. Accordingly, I do not think that your Lordships would be wise to use this as an occasion to lay down categories of cases in which it would necessarily always be an abuse to seek in an action begun by writ or originating summons a remedy against infringement of rights of the individual that are entitled to protection in public law.
>
> The position of applicants for judicial review has been drastically ameliorated by the new Order 53. It has removed all those disadvantages, particularly in relation to discovery, that were manifestly unfair to them and had, in many cases, made applications for prerogative orders an inadequate remedy if justice was to be done. This it was that justified the courts in not treating as an abuse of their powers resort to an alternative procedure by way of action for a declaration or injunction (not then obtainable on an application under Order 53), despite the fact that this procedure had the effect of depriving the defendants of the protection to statutory tribunals and public authorities for which for public policy reasons Order 53 provided.

[36] It is to be noted that the submission of the learned senior federal counsel is somewhat scant on the issue of the abuse of process. It is not a question here of the appellant not being able to have access to the court but a question what procedure should

be adopted. The requirement for O. 53 to be utilised is predicated on the following (a) the challenge is on public law where the validity of a public authority's act or omission is being questioned and (b) the appellant is not seeking to enforce a completely constituted private law right but his right of employment as a Minister. In the only case cited by the learned senior federal counsel that is *Gabriel Peter & Partner v. Wee Chong Jin* [1998] 1 SLR 374 Young Rung How CJ (as he then was) stated, *inter alia*, while considering the principles for striking out an action as follows (at p. 384 para 22):

> The term 'abuse of the process of the Court' in O. 18 r. 19(1)(d) has been given a wide interpretation by the courts. It includes considerations of a public policy and the interests of justice. This term signifies that the process of the court must be used *bone fide* and properly and must not be abused. The court will prevent the improper use of its machinery.

[37] Again to refer to *O'Reilly v. Mackman* Lord Diplock further rationalised the approach with regard to the scope of O. 53, at p. 285:

> Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.
>
> My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis – a process that your Lordships will be continuing in the next case in which judgment is to be delivered.

[38] This suit raises public law issues as it is a decision and action taken by the Prime Minister in pursuance of the provisions of the Federal Constitution that is being impugned. As such a decision taken by the Prime Minister with regard to a Minister as a member of the administration in his public duties is one which has implications for the public as a whole and it is in consequence of this that the public law is concerned with the decision making process. The legal sources of the powers that are being impugned are in the public domain. As such to institute the proceedings by ordinary summons, though seemingly appearing to be simple in procedure, will deprive the public authority in this case the Federal Government and in the circumstances of the present case, of the protection of the law that it is entitled to by the processes available under O. 53.

[39] It is reasonable to anticipate that had the trial judge not grant the application to strike out in favour of the respondents, the respondents would have lodged an appeal. Although the position would be hypothetical in the present circumstances, such an appeal would serve to illustrate further that this suit is ill founded. And the reason is better explained in the following passage in the case of *R v. Entry Clearance Officer, Bombay, Ex p Amin* [1983] 2 AC 818 at p. 829 per Lord Fraser of Tullybelton:

> Judicial review is not concerned with the merits of a decision but with the manner in which the decision was made ... Judicial review is different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrator.

[40] For the reasons elaborated above I have found that the suit is ill founded, constituting a misuse of the processes of court and therefore unsustainable. This appeal is dismissed with costs and the judgment of the trial judge is affirmed.